Afternoon Advisory

SUPREME COURT CONFIRMATION CENTER

July 27, 2005

Noteworthy:

"If our friend from New York insists that Judge Roberts answers these types of questions, it will be a radical departure from the practice that the committee followed with Justice O'Connor, Justice Breyer, Justice Ginsburg and other Supreme Court nominees. These nominees were given discretion in not answering questions on issues that might come before the Court. It was agreed that it would be improper for a potential justice to pre-commit on a matter."

-Senator McConnell, Floor Statement, 7/27/05; Full Statement

"Any of our colleagues can, of course, ask whatever questions they want, but the notion that Judge Roberts puts his confirmation at risk if he does not answer the questions on the list from the Senator from New York is contrary to the traditional practice of this body. Nearly every single one of the questions on that list involves an issue that is likely to come before the Supreme Court during Justice Roberts's tenure. Every single Justice confirmed in recent memory has declined to answer questions of the sort contained on that list."

-Senator Cornyn, Floor Statement, 7/27/05; Full Statement

Remarks of Senator Mitch McConnell
On Following the Ginsburg Standard,
Not a Double Standard
July 27, 2005

Mr. President, with the nomination of Judge John Roberts to be the next Justice of the Supreme Court of the United States, the President has selected one of the foremost legal minds of his generation. Many of my colleagues have already spoken Judge Roberts's praises on this floor, and I agree with all of them. Judge Roberts possesses a keen intellect, an open mind, a judicious temperament, and a sterling reputation for integrity. He will faithfully apply the Constitution, not legislate from the bench. He should be confirmed in time for the Court to operate at full strength by October 3.

Looking to recent history, and looking more specifically to the most recent Supreme Court nominations of Justices Ruth Bader Ginsburg and Stephen Breyer, I would think that I should not have cause to worry how this nominee will be treated. Then, as now, the President's party controlled the Senate. Then, as now, the President

nominated a jurist whose credentials could not be questioned. The only difference is that the occupant of the White House then was a Democrat, and the current president is a Republican.

But that one simple fact may make all the difference to some of my friends on the other side of the aisle.

In recent weeks I have begun to worry that some of my Democratic friends have forgotten the standard to which the Senate held Justices Breyer and Ginsburg when they were nominees. Mr. President, Judge Roberts deserves the same standard, no more or no less, than the nominees of the previous President. But I fear that "the Ginsburg-Breyer standard"—which I will call the "Ginsburg standard" for short--is giving way to a double standard. I would like to remind my colleagues of recent history, so we may draw some lessons from the confirmation processes of Justices Breyer and Ginsburg.

Both Ruth Bader Ginsburg and Stephen Breyer came to the Senate with a distinguished record and a deserved reputation for a fine legal mind. But Justice Ginsburg also came with a long record of liberal advocacy and thought-provoking, shall we say, statements. Yet the Senate handled her nomination in a manner that brought credit to the institution. It followed a respectful process. Indeed, it can be said that "respect"—both for the President and his nominee—was a hallmark of her nomination, and the nomination of Stephen Breyer.

In the Ginsburg nomination, the Senate recognized that most judicial nominees, including Justice Ginsburg, have at one point been private practitioners of the law. The Senate recognized that it is unfair to attribute to lawyers the actions of their clients. Lawyers are zealous advocates for their clients. Lawyers speak for their clients, not themselves.

After all, if a lawyer defends a client accused of stealing a chicken, it does not then follow that the lawyer is a chicken thief. Again, if a lawyer defends a client accused of stealing a chicken, it does not then follow that the lawyer is a chicken thief. By following this standard, the Senate did not hold against Justice Ginsburg the policy positions of her most famous client, the American Civil Liberties Union.

As we know, the ACLU takes consistently liberal positions on high-profile issues--positions that many Americans strongly disagree with. I respect that. I do not often agree with the ACLU, but its members believe strongly, and they fight for their beliefs. I think that is admirable.

During Justice Ginsburg's tenure as a General Counsel and a Member of its Board, the ACLU, for example, opposed restrictions on pornography. Yet even though her client had adopted controversial policy positions, the Senate did not attribute them to Justice Ginsburg, let alone disqualify her from service on the Supreme Court because of them.

In addition, this country values a healthy "market-place of ideas." So, the Senate did not block Justice Ginsburg's nomination because she made controversial and thought-provoking statements in her private capacity as a legal thinker. These ranged from suggesting a constitutional right to prostitution, to proposing abolishing "Mother's Day" and "Father's Day" in favor of a unisex "Parent's Day." Why did we not do so? Because by a 96-3 margin, we decided she had the integrity to apply the law fairly to each case, despite her personal beliefs.

With both the Ginsburg and Breyer nominations, the Senate also continued its long-standing practice of respecting a nominee's right not to disclose personal views or to answer questions that could prejudge cases or issues. Senators may ask a nominee whatever questions they want. But the nominee also has the right not to comment on matters the nominee feels could compromise their judicial independence.

For example, during his Supreme Court confirmation hearing in 1967, Thurgood Marshall declined to answer a question regarding the Fifth Amendment. He explained:

> "I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed, sit on the Court and when a Fifth Amendment case comes up, I will have to disqualify myself."

Justice O'Connor, whom our Democratic colleagues have been citing so glowingly, also demurred regarding questions she thought would compromise her independence. One of those questions asked her view of a case that had already been decided, *Roe v. Wade*; and in explaining her position, she said:

> "I feel it is improper for me to endorse or criticize a decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts. I do not think we have seen the end of that issue or that holding and that is the concern I have about expressing an endorsement or criticism of that holding."

The Senate continued this practice with the Breyer and Ginsburg nominations. It did not require them to state their private views, or to prejudge matters before they had read one word of a brief or heard one word of oral argument.

Justice Breyer explained why he had to be careful about pre-committing to matters:

> "I do not want to predict or to commit myself on an open issue that I feel is going to come up in the Court. . . . There are two real reasons. The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. . . . The other reason, which is equally important, is. . . . it is so important that the clients and the lawyers understand that judges are really open-minded."

The Senate respected Justice Breyer's concerns about prejudging and confirmed him by an overwhelming 87-9 margin. This respect extended to cases that had already been decided. For example, our late colleague, Senator Thurmond, asked Justice Breyer about *Roe v. Wade,* a case that had been decided 21 years earlier. Like Justice O'Connor, Justice Breyer declined to comment, stating:

> "The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court."

Senator Thurmond respected Justice Breyer's position, and did not hold against Justice Breyer his decision not to answer that question. Other Senators did the same on a host of issues.

Justice Breyer also declined to give his personal views. He explained, "The reason that I hesitate to say what I think as a person as opposed to a judge is because down that

road are a whole host of subjective beliefs, many of which I would try to abstract from." As result, he declined to give his personal views on whether the death penalty was cruel and unusual, what the scope of the exclusionary rule should be and whether he supported tort reform.

Justice Ginsburg also invoked her prerogative not to answer questions that could compromise her independence, and both sides of the aisle respected her decision. Indeed, Senator Biden, who was then Chairman, encouraged her not to answer questions that would preview her position on a legal issue. He told her:

> "I will have statements that I made during the process read back to me. But I do think it is appropriate to point out, Judge, that you not only have a right to choose what you will answer and not answer, but in my view you should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms, probably, over your tenure on the Court."

Justice Ginsburg's effort to remain unbiased —like Justices O'Connor and Breyer--included not commenting on cases that had already been decided. For example, Justice Ginsburg was asked how she would have ruled in *Rust v. Sullivan*, an abortion case that had already been decided. She declined to answer, explaining her position with a metaphor of the slippery slope:

> "I sense that I am in the position of a skier at the top of that hill, because you are asking me how I would have voted in *Rust v. Sullivan*. Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. . . . If I address the question here, if I tell this legislative chamber what my vote will be, then my position as a judge could be compromised."
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> Indeed, Justice Ginsburg declined to comment 55 times on a variety of legal questions. That's 55 times, Mr. President. These included:
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> - If the Second Amendment guarantees an individual right to bear arms;
> - If the death penalty is cruel and unusual punishment under the Eighth Amendment;
> - If school vouchers for children are constitutional under the Establishment Clause;
> - If the Supreme Court had interpreted too narrowly the Voting Rights Act;
> - If the First Amendment was intended to erect a wall of separation between church and state; and
> - If the federal government may prohibit abortion clinics from using federal funds to advocate performing abortions.
>
> Mr. President, that is a lot of "ifs."

Both Justices Ginsburg and Breyer were reported out of the committee promptly; Republicans did not try to delay the committee vote. Nor did Republicans try to deny these nominees the courtesy of an up or down vote on the Senate floor.

As I mentioned, Justice Ginsburg was confirmed 96-3 after two days of debate. Justice Breyer was confirmed 87-9 after only a single day of debate. By giving these nominees up or down votes, the Senate continued the practice it had followed with even contested Supreme Court nominees, like Robert Bork and Clarence Thomas. The average time for Senate consideration of the Ginsburg and Breyer nominations was 58

days. For Justice Ginsburg's nomination, the entire process lasted only 42 days from nomination to confirmation.

Conclusion

Mr. President, it troubles us on this side of the aisle, and it should trouble all Americans, when different standards are applied to different people for no valid reason. Unfortunately, this already appears to be happening with respect to the nomination of Judge John Roberts.

Judge Roberts will no doubt be as forthcoming as he properly can be when he testifies. However, as with all nominees, there are some questions that he will not be able to answer. His decision ought to be respected.

But our colleague Senator Schumer has declared that for this nomination, "Every question is a legitimate question, period." And he plans on asking Judge Roberts some 70 questions. These include specific issues that will likely come before the court. In addition, he wants Judge Roberts to discuss how he would have voted in specific cases, such as *New York Times v. Sullivan* and *United States v. Lopez.*

If our friend from New York insists that Judge Roberts answers these types of questions, it will be a radical departure from the practice that the committee followed with Justice O'Connor, Justice Breyer, Justice Ginsburg and other Supreme Court nominees. These nominees were given discretion in not answering questions on issues that might come before the Court. It was agreed that it would be improper for a potential justice to pre-commit on a matter.

Mr. President, we on this side of the aisle are not asking the Senate to change its practices or standards. We are not asking that this President be treated better than his immediate predecessor. We are asking for equal treatment. .In short, Mr. President, we are simply asking that the Senate follow the Ginsburg standard, not a double standard.

I am hopeful that the courtesy and respect the Senate showed President Clinton's nominees, and prior Supreme Court nominees, will continue with Judge Roberts. After all, Mr. President, it's only fair.

I thank the Chair, and I yield the floor.

Floor Statement of Senator John Cornyn
7/27/05
Nomination of Judge John Roberts

Mr. CORNYN. Mr. President, I would like to take a few minutes to comment on the nomination of Judge John Roberts to serve on the U.S. Supreme Court. In particular, I would like to provide some context in a brief response to some statements that have been made by our colleague on the other side of the aisle, the senior Senator from New York.

My colleague has repeatedly stated his intention to ask Judge Roberts during the confirmation proceedings dozens of questions about his positions on particular constitutional rights, as well as his views of particular cases that have been decided by the U.S. Supreme Court.

He provided Judge Roberts a copy of these questions last week when the two of them met and has stated that he will take "responsibility to make sure that those questions are answered."

Any of our colleagues can, of course, ask whatever questions they want, but the notion that Judge Roberts puts his confirmation at risk if he does not answer the questions on the list from the Senator from New York is contrary to the traditional practice of this body. Nearly every single one of the questions on that list involves an issue that is likely to come before the Supreme Court during Justice Roberts's tenure. Every single Justice confirmed in recent memory has declined to answer questions of the sort contained on that list.

As Justice Ginsburg has noted:

> "In accord with longstanding norm, every member of the current Supreme Court declined to furnish such information to the Senate."

Every member of the Court has declined to answer such questions because it has long been understood that forcing nominees to take sides on issues while under oath compromises their ability to rule impartially in cases presenting those issues once they sit on the Court.

Judges are supposed to decide cases after hearing the evidence presented by the parties involved and the arguments presented by their lawyers. They are supposed to keep an open and impartial mind.

As Justice Ginsburg has also noted, "the line each [Justice] drew in response to preconfirmation questioning is...crucial to the health of the Federal judiciary."

Judges in our system are like umpires in a baseball game. They are not supposed to take sides before the game has begun. Judges are not, for example, supposed to pledge to the Senate that they will be "on the side of labor" or "on the side of corporations" once confirmed to the bench. We should not demand of judges that they are biased on behalf of a particular party before they have even gotten to the bench and heard the facts and the arguments of counsel.

The only side that a judge should be on is on the side of the law. Indeed, that is the oath that each of them take when they are sworn into office. Sometimes corporations should win in court, and sometimes they should lose. Sometimes labor should win in court, and sometimes labor should lose. But it depends on the facts of the case and on the law that applies to those facts. Any judge worth their salt would decline to make a commitment ahead of time about how that hypothetical controversy would come out, not knowing what those facts are or how the question would be presented.

The Senator from New York has said that his questions do not threaten Judge Roberts' impartiality because he is not asking about specific cases that are already pending before the Supreme Court. He acknowledges that asking questions about those cases -- in other words, cases that are actually pending -- would be inappropriate. But I would ask my colleague to review, as I have, the Supreme Court's pending cases for the session set to begin in October because it clearly shows that this proposed list of questions would force Judge Roberts to prejudge the very pending cases that the Senator has said should be off limits.

Take, for example, the question of whether Judge Roberts “believes Roe v. Wade was correctly decided.” That is one of the Senator's questions. The Senator has said specifically that this is a "question that should be answered."

Demanding that Judge Roberts answer questions about Roe v. Wade will undoubtedly force him to prejudge a case that is currently pending on the Court's docket. On November 30, the Supreme Court will hear arguments in Ayotte v. Planned Parenthood, a case involving the constitutionality of a New Hampshire law requiring a minor to notify her parents before having an abortion.

It is nearly certain that some party in that litigation, perhaps even an amicus party, will ask the Court to revisit or overturn Roe v. Wade because one party does so in nearly every abortion case that reaches the U.S. Supreme Court.

Thus, whether Roe v. Wade should be overturned is not only an issue likely to come before the Court during Judge Roberts' tenure, it is already before the Court.

Accordingly, demanding an answer to a question about Roe v. Wade will force Judge Roberts to prejudge at least one of the issues in the Ayotte case, and, no doubt, many others while he is on the bench.

Perhaps an even better example is the Senator's question about whether "the Americans with Disabilities Act requires State buildings to be accessible to the disabled...or [whether] sovereign immunity exempts the States?" Again, on November 9, the Supreme Court is scheduled to hear a case called Goodman v. Georgia, a case involving a suit by a disabled prisoner against the State of Georgia. The only question in that case is whether the Americans with Disabilities Act can force States to make prisons accessible to the disabled. Again, this is precisely the question that the Senator warned Judge Roberts that he would not have to answer but which, in fact, he is now being asked to answer.

It is clear then that the questions proposed by the Senator from New York will force Judge Roberts to prejudge pending cases. This is something that surely all of us can agree is inappropriate. Thus, surely all of us can agree in this Chamber that Judge Roberts should be permitted to decline to answer at least some of the questions that the Senator from New York has said he will ask him and others like those questions.

But once it is acknowledged that Judge Roberts should be permitted to decline to answer the questions involving issues already pending before the Supreme Court, it becomes clear that Judge Roberts should be permitted to decline the rest of the questions propounded by the Senator as well.

There are literally hundreds of cases at this very moment in lower Federal courts raising virtually all of the questions posed by the Senator from New York. Judge Roberts should not be forced to guess which one of them will or will not one day make their way to the High Court. This is why the Canons of Judicial Ethics counsel judges against answering questions about issues that are not only already before the Court, but also those that are likely to come before the Court.

Any case pending in the lower courts meets this definition because it could be and, indeed, many will be appealed to the U.S. Supreme Court.

Indeed, the danger of demanding that Judge Roberts answer such questions, even though some may not now be pending before the Court, is clear from an event involving one of the sitting Justices, Justice Scalia.

Two years ago, after delivering a speech, Justice Scalia was asked whether he thought the phrase "under God" -- that is the reference in the Pledge of Allegiance -- was constitutional. There was not at that time any case involving that question before the Court, so Justice Scalia answered the question. But there was, as it turns out, a case

involving that precise question pending before a lower Federal court and, as we all know, that case eventually made its way to the Supreme Court. As we also know, Justice Scalia was then forced to recuse himself from hearing that case because the rules of ethics prevent judges from publicly commenting on pending or impending cases.

We should not force Judge Roberts to choose between confirmation and recusal. If Judge Roberts is forced to recuse himself in all of the cases, all of the issues on the Senator's list, then the Supreme Court will be left shorthanded for much of his tenure.

The Senator from New York says that his list includes some of the most important questions of the day, and that may well be true. But surely we want all nine Justices on the Supreme Court to answer those important questions in those cases as they are presented.

Judge Roberts should be permitted to do what we have always permitted nominees to do, and that is to decline to answer questions that might call into question his impartiality at a later date. We have always respected the right of nominees to decline to answer questions that make them feel as though their ability to do their job would be compromised. That is in the interest of a value that we all hold dear, and that is the independence of the judiciary.

I hope and expect that we will not break that longstanding tradition with Judge Roberts.

I yield the floor and suggest the absence of a quorum.